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ABSTRACT

This memo describes provisions in state and federal law relating to confidentiality and disclosure of children's records kept by law enforcement officers, courts, and schools. It does not discuss confidentiality of children's medical records or child abuse reports. These provisions are discussed: (1) law enforcement and court records of children are confidential records, to be released or disclosed only under limited circumstances set forth in the statutes; (2) records of children in the care or custody of an agency may not be disclosed except by the order of a court); and (3) school records (a) as a general rule all pupil records maintained by a public school must be kept confidential and school boards are required to adopt regulations to maintain the confidentiality of pupil records, (b) behavioral pupil records which include psychological tests, personality evaluations, written statements relating to an individual's personality are not progress records and must be released to an adult pupil or parent of a minor pupil, (c) directory data such as name, address, etc. may be disclosed providing the school has given public notice on the categories of information designated as directory data; (d) progress records must be shown to the pupil or the parent of a minor pupil, and (e) any school or institution to which federal funds are made available must comply with federal regulations relating to the privacy rights of parents and students. Sections of relevant laws are attached. (ABL)

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EDUCATION
MEMO NO. 1
February 6, 1989

TO: MEMBERS OF THE SUBCOMMITTEE ON EDUCATION OF THE SPECIAL COMMITTEE ON JUVENILE JUSTICE ISSUES

FROM: Pam Russell, Staff Attorney

SUBJECT: Confidentiality of Children's Records

This Memo was prepared for use by the Subcommittee on Education of the Legislative Council's Special Committee on Juvenile Justice Issues. The Memo describes provisions in state and federal law relating to confidentiality and disclosure of children's records kept by law enforcement officers, courts and schools. This Memo does not discuss confidentiality of children's medical records or child abuse reports.

A. LAW ENFORCEMENT AND COURT RECORDS

As a general rule, law enforcement and court-related records of children are confidential records, to be released or disclosed only under limited circumstances set forth in the statutes.

1. Records in the Custody of Peace Officers

Under s. 48.396 (1), Stats., peace officers' records of children are to be kept separate from records of adults and may only be disclosed under limited circumstances. The records of children age 16 to 18 who are transferred to the criminal courts are not subject to the confidentiality provisions under ch. 48. The term "peace officers" is not defined under ch. 48, but generally refers to any person vested by law with a duty to maintain public order or to make arrests for a crime [see s. 939.22 (22), Stats.].

A peace officer may disclose children's records to officials of the school attended by the child or to other law enforcement or social welfare

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agencies. These persons must, however, maintain the confidentiality of the information contained in the records. According to a 1980 Attorney General's opinion, s. 48.396 (1), Stats., permits, but does not require, the exchange of information between the police and officials of the school attended by a child. According to the Attorney General, a juvenile officer should not disclose information concerning a child under this section when there is reason to believe that the information sought will not or could not practically be kept confidential [69 OAG 179].

Other circumstances under which a peace officer may disclose children's records covered under s. 48.396 (1) include the release of records by order of a juvenile court; the release of records to a victim of a child's act under a court order for such disclosure; and the release of names of the child and the child's parents to a victim of a child's act or alleged act, with the approval of the court.

2. Court Records

Children's records relating to proceedings before a juvenile court (and proceedings before a circuit or municipal court exercising jurisdiction over children's violations of traffic or boating laws, civil offenses or local ordinances) are also confidential records. These records may not be open to inspection or their contents disclosed except by order of a juvenile court. Exceptions to the rule of nondisclosure are provided for, including: (a) court records in certain types of traffic proceedings; and (b) the release of records to the Department of Transportation (DOT) when a court revokes, suspends or restricts a child's driver's license [s. 48.396 (2), Stats.].

If a child is adjudged delinquent by a juvenile court, the court clerk is required to notify the school board of the school district in which the child is enrolled of the fact that the child has been adjudicated delinquent. No other information from the child's court record may be disclosed to the school board except by order of the court. Any information that is disclosed to the school district must be kept confidential and may only be disclosed by the school board to employes of the school district who have been determined by the school board to have legitimate educational interests in the information. A child's parent may prohibit this disclosure to the school board by requesting, in writing, that the information not be provided to the school board by the court [s. 48.396 (7), Stats.].

B. RECORDS OF CHILDREN IN THE CARE OR CUSTODY OF AN AGENCY

Under s. 48.78, Stats., any record kept, or information received, about an individual in the care and custody of the Department of Health and Social Services (DHSS), a county department, a licensed child welfare agency, a licensed day care center or a licensed maternity hospital must be kept confidential and may not be disclosed except by order of a court. General exceptions to the rule of nondisclosure apply to certain medical information, information identifying a child's parents, adoption records and child abuse reports.

Two other specific exemptions to confidentiality of these records are provided. The first exemption permits the confidential exchange of information between the agency and another social welfare or law enforcement agency regarding an individual in the care or legal custody of one of the agencies. The second exemption permits the release of information in order to assist in securing the return of a child who has been adjudged delinquent and who has escaped from a secured correctional facility or is on unauthorized absence.

C. SCHOOL RECORDS

1. State Confidentiality Laws

State law contains restrictions on the release of "pupil records," defined as all records relating to individual pupils maintained by an elementary or high school. Personal notes or records maintained for personal use and records necessary for the psychological treatment of a pupil are not included in the definition of pupil records. Also, effective September 1, 1989, the term "pupil records" will not include pupil health care records [s. 118.125 (1) (d), Stats., as affected by 1987 Wisconsin Act 70].

a. Disclosure of Pupil Records Generally

As a general rule, all pupil records maintained by a public school must be kept confidential. School boards are required to adopt regulations to maintain the confidentiality of pupil records. Pupil records may be made available to professional persons employed by the school district and other school district officials who have been determined by the school board to have legitimate educational interests in the records. Also, pupil records must be provided to a court in response to subpoena by parties to a legal action. Pupil records may be used in this manner only for purposes of impeachment of any witnesses in the court action.

In compliance with a court order, a school board is required to disclose pupil records of a pupil who has been adjudged delinquent and ordered by the court to participate in educational programming. Under this provision, a judge may order the school board to disclose the child's pupil records to the county department or a licensed child welfare agency responsible for supervising the child, if such disclosure is necessary to determine the child's compliance with the order to participate in educational programming. A school board must make a reasonable effort to notify the pupil's parent or legal guardian prior to disclosing records under this provision [ss. 118.125 (2) (L) and 48.34 (12) (b), Stats.].

b. Disclosure of Specific Types of Pupil Records

Pupil records are subdivided into three categories: (1) behavioral records; (2) directory data; and (3) progress records.

"Behavioral records" are defined as those pupil records which include psychological tests, personality evaluations, records of conversations, any written statement relating specifically to an individual pupil's behavior, tests relating specifically to achievement or measurement of ability, the pupil's physical health records and any other pupil records which are not progress records. Effective September 1, 1989, the pupil's physical health records will not be included in the definition of behavioral records [s. 118.125 (1) (a), Stats., as affected by 1987 Wisconsin Act 70].

Behavioral records must be released to an adult pupil or the parent or the guardian of a minor pupil upon that person's request. These records must be shown in the presence of a person qualified to explain and interpret the records. Upon request, the person must be provided with a copy of the behavioral records [s. 118.125 (2) (b), Stats.].

A school must also release behavioral records according to the written permission of an adult pupil or the parent or guardian of a minor pupil. The permission must specify the name of the person to whom the behavioral records may be released [s. 118.125 (2) (e), Stats.].

"Directory data" means those pupil records which include the pupil's name, address, telephone listing, date and place of birth, major field of study, participation in officially-recognized activities and sports, weight and height of members of athletic teams, dates of attendance, photographs, degrees and awards received and the name of the school most recently previously attended by the pupil [s. 118.125 (1) (b), Stats.].

These records may be disclosed to any person, if the school has given public notice on the categories of information designated as directory data. A parent, legal guardian or guardian ad litem of any pupil must

have an opportunity to inform the school that all or any part of the directory data may not be released without that person's prior consent [s. 118.125 (2) (j), Stats.].

"Progress records" mean those pupil records which include the pupil's grades, a statement of the courses the pupil has taken, the pupil's attendance record and records of the pupil's school extracurricular activities.

These records must be shown to a pupil, or the parent or guardian of a minor pupil, upon that person's request. Progress records shall also be provided to the judge of any court when the pupil is the subject of any proceeding in that court. Finally, progress records may be disclosed under the written permission of an adult pupil or the parent or guardian of a minor pupil. The person to whom the records may be disclosed must be named in the written permission [s. 118.125 (2) (a), (c) and (e), Stats.].

Effective September 1, 1989, pupil health care records are to be treated separately from other pupil records. As of that date, pupil health care records are to be treated the same as patient health records under ss. 146.81 to 146.83, Stats. A copy of those statutes is attached to this Memo.

Information received from a pupil that the pupil or another pupil is using or is experiencing problems resulting from the use of alcohol or other drugs is treated separately from other types of pupil records. Under s. 118.126, Stats., a school psychologist, counselor, social worker, nurse, teacher or administrator designated by the school board who engages in alcohol or drug abuse program activities must keep alcohol or drug-related information confidential. Exceptions to this general rule of confidentiality apply if the pupil using or experiencing problems resulting from the use of alcohol or other drugs consents, in writing, to the disclosure of the information. Also, if the school personnel who have the information have reason to believe that there is serious and imminent danger to the health, safety or life of any person and that disclosure of the information to another person will alleviate the danger, the information may be disclosed. Finally, this information must be disclosed if it involves a child who is the victim or alleged victim of abuse or neglect.

2. Federal Law Relating to Confidentiality of School Records

Under the Federal Family Educational and Privacy Rights Act, any school or institution to which funds are made available under any federal program administered by the U.S. Department of Education must comply with

federal regulations relating to the privacy rights of parents and students [20 U.S.C. s. 1232g].

As a general rule, the education records of a student, other than directory information, may not be disclosed to anyone without the written consent of the minor student's parent or an adult student. Each school must have in place a written policy consistent with this rule of nondisclosure. This policy must also specify the personally identifiable information to be designated as directory information.

For purposes of this requirement, "directory information" includes the student's name, address, telephone number, date and place of birth, major field of study, participation in officially recognized activities and sports, weight and height of members of athletic teams, dates of attendance, degrees and awards received, the most recent previous educational agency or institution attended by the student and other similar information [34 C.F.R. ss. 99.2, 99.5 (a) (3) and 99.30 (a) (1)].

Federal Regulations provide some circumstances under which a school may release these records without prior consent for disclosure. These circumstances generally relate to disclosing information to: (a) other educational agencies or institutions; (b) providers of student financial aid; and (c) organizations conducting, developing, validating or administering predictive tests, administering student aid programs and improving instruction. Information released under this last category may not identify specific students.

Another exception to the general rule of confidentiality is provided if the school is required to comply with a judicial order or lawfully-issued subpoena. Information may be released under this exception if the educational agency or institution makes a reasonable effort to notify the parent of the student, or the adult student, of the order or subpoena in advance of the release of the information [34 C.F.R. s. 99.31].

With respect to school records which fall into the category of "directory information," as set forth in the school's policy statement, the school may disclose this information without the written consent of the student. If the directory information relates to a student who is still in attendance at the institution or educational agency, the institution or agency must provide an adult student, or a minor student's parent, with the right to prohibit the directory information from being disclosed if this right is exercised within a specified period of time. If the directory information relates to a student who is no longer in attendance at the educational agency or institution, the agency or institution may disclose that information under any circumstances, without

having to provide the adult student or the minor student's parent an opportunity to prohibit disclosure.

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Attachment

ATTACHMENT

Sections 146.81 to 146.83, Stats.

146.81 HEALTH CARE RECORDS; DEFINITIONS. In ss. 146.81 to 146.83:

(1) "Health care provider" means a nurse licensed under ch. 441, a chiropractor licensed under ch. 446, a dentist licensed under ch. 447, a physician, podiatrist or physical therapist licensed or an occupational therapist or occupational therapy assistant certified under ch. 448, an optometrist licensed under ch. 449, a psychologist licensed under ch. 455, a partnership thereof, a corporation thereof that provides health care services, an operational cooperative sickness care plan organized under ss. 185.981 to 185.985 that directly provides services through salaried employes in its own facility, or an inpatient health care facility or community-based residential facility, as defined in s. 140.85 (1) or 140.86.

(2) "Informed consent" means written consent to the disclosure of information from patient health care records to an individual, agency or organization containing the name of the patient whose record is being disclosed, the purpose of the disclosure, the type of information to be disclosed, the individual, agency or organization to which disclosure may be made, the types of health care providers making the disclosure, the signature of the patient or the person authorized by the patient, the date on which the consent is signed and the time period during which the consent is effective.

(3) "Patient" means a person who receives health care services from a health care provider.

(4) "Patient health care records" means all records related to the health of a patient prepared by or under the supervision of a health care provider, but not those records subject to s. 51.30, reports collected under s. 69.186, records of tests administered under s. 343.305 or fetal monitor tracings, as defined under s. 146.817 (1).

(5) "Person authorized by the patient" means the parent, guardian or legal custodian of a minor patient, as defined in s. 48.02 (8) and (11), the guardian of a patient adjudged incompetent, as defined in s. 880.01 (3) and (4), the personal representative or spouse of a deceased patient or any person authorized in writing by the patient. If no spouse survives a deceased patient, "person authorized by the patient" also means an adult member of the deceased patient's immediate family, as defined in s. 632.895 (1) (d). A court may appoint a temporary guardian for a patient believed incompetent to consent to the release of records under this section as the person authorized by the patient to decide upon the release of records, if no guardian has been appointed for the patient.

146.82 CONFIDENTIALITY OF PATIENT HEALTH CARE RECORDS. (1) CONFIDENTIALITY. All patient health care records shall remain confidential. Patient health care records may be released only to the persons designated in this section or to other persons with the informed consent of the patient or of a person authorized by the patient. This subsection does not prohibit reports made in compliance with s. 146.995 or testimony authorized under s. 905.04 (4) (h).

(2) ACCESS WITHOUT INFORMED CONSENT. (a) Notwithstanding sub. (1), patient health care records shall be released upon request without informed consent in the following circumstances:

1. To health care facility staff committees, or accreditation or health care services review organizations for the purposes of conducting management audits, financial audits, program monitoring and evaluation, health care services reviews or accreditation.

2. To the extent that performance of their duties requires access to the records, to a health care provider or any person acting under the supervision of a health care provider or to a person licensed under s. 146.35 or 146.50, including but not limited to medical staff members, employes or persons serving in training programs or participating in volunteer programs and affiliated with the health care provider, if:

a. The person is rendering assistance to the patient;

b. The person is being consulted regarding the health of the patient; or

c. The life or health of the patient appears to be in danger and the information contained in the patient health care records may aid the person in rendering assistance.

d. The person prepares or stores records, for the purposes of the preparation or storage of those records.

3. To the extent that the records are needed for billing, collection or payment of claims.

4. Under a lawful order of a court of record.

5. In response to a written request by any federal or state governmental agency to perform a legally authorized function, including but not limited to management audits, financial audits, program monitoring and evaluation, facility licensure or certification or individual

licensure or certification. The private pay patient, except if a resident of a nursing home, may deny access granted under this subdivision by annually submitting to a health care provider, other than a nursing home, a signed, written request on a form provided by the department. The provider, if a hospital, shall submit a copy of the signed form to the patient's physician.

6. For purposes of research if the researcher is affiliated with the health care provider and provides written assurances to the custodian of the patient health care records that the information will be used only for the purposes for which it is provided to the researcher, the information will not be released to a person not connected with the study, and the final product of the research will not reveal information that may serve to identify the patient whose records are being released under this paragraph without the informed consent of the patient. The private pay patient may deny access granted under this subdivision by annually submitting to the health care provider a signed, written request on a form provided by the department.

7. To a county agency designated under s. 46.90 (2) or other investigating agency under s. 46.90 for purposes of s. 46.90 (4) (a) and (5). The health care provider may release information by initiating contact with the county agency without receiving a request for release of the information from the county agency.

8. To the department under s. 46.73. The release of a patient health care record under this subdivision shall be limited to the information prescribed by the department under s. 46.73 (2).

9. To staff members of the protection and advocacy agency designated under s. 51.62 (2) or to staff members of the private, nonprofit corporation with which the agency has contracted under s. 51.62 (3) (a) 3, if any, for the purpose of protecting and advocating the rights of a person with development disabilities, as defined under s. 51.62 (1) (a), who resides in or who is receiving services from an inpatient health care facility, as defined under s. 51.62 (1) (b), or a person with mental illness, as defined under s. 51.62 (1) (bm), except that if the patient has a guardian information concerning the patient obtainable by staff members of the agency or nonprofit corporation with which the agency has contracted is limited to the name, birth date and county of residence of the patient, information regarding whether the patient was voluntarily admitted, involuntarily committed or protectively placed and the date and place of admission, placement or commitment, and the name and address of any guardian of the patient and the date and place of the guardian's appointment. Any staff member who wishes to obtain additional information shall notify the patient's guardian in writing of the request and of the guardian's right to object. The staff member shall send the notice by

mail to the guardian's address. If the guardian does not object in writing within 15 days after the notice is mailed, the staff member may obtain the additional information. If the guardian objects in writing within 15 days after the notice is mailed, the staff member may not obtain the additional information.

10. To persons as provided under s. 655.17 (7) (b), as created by 1985 Wisconsin Act 29, if the patient files a submission of controversy under s. 655.04 (1), 1983 stats., on or after July 20, 1985 and before June 14, 1986, for the purposes of s. 655.17 (7) (b), as created by 1985 Wisconsin Act 29.

11. To a county department, as defined under s. 48.02 (2g), a sheriff or police department or a district attorney for purposes of investigation of threatened or suspected child abuse or neglect or prosecution of alleged child abuse or neglect if the person conducting the investigation or prosecution identifies the subject of the record by name. The health care provider may release information by initiating contact with a county department, sheriff or police department or district attorney without receiving a request for release of the information. A person to whom a report or record is disclosed under this subdivision may not further disclose it, except to the persons, for the purposes and under the conditions specified in s. 48.981 (7).

12. To a school district employe or agent, with regard to patient health care records maintained by the school district by which he or she is employed or is an agent, if any of the following apply:

a. The employe or agent has responsibility for preparation or storage of patient health care records.

b. Access to the patient health care records is necessary to comply with a requirement in federal or state law.

13. To persons and entities under s. 940.22.

(b) Unless authorized by a court of record, the recipient of any information under par. (a) shall keep the information confidential and may not disclose identifying information about the patient whose patient health care records are released.

(3) REPORTS MADE WITHOUT INFORMED CONSENT. (a) Notwithstanding sub. (1), a physician who treats a patient whose physical or mental condition in the physician's judgment affects the patient's ability to exercise reasonable and ordinary control over a motor vehicle may report the patient's name and other information relevant to the condition to the department of transportation without the informed consent of the patient.

(b) Notwithstanding sub. (1), an optometrist who examines a patient whose vision in the optometrist's judgment affects the patient's ability to exercise reasonable and ordinary control over a motor vehicle may report the patient's name and other information relevant to the condition to the department of transportation without the informed consent of the patient.

146.83 PATIENT ACCESS TO HEALTH CARE RECORDS. (1) Except as provided in s. 51.30 or 146.82 (2), any patient or other person may, upon submitting a statement of informed consent:

(a) Inspect the health care records of a health care provider pertaining to that patient at any time during regular business hours, upon reasonable notice.

(b) Receive a copy of the patient's health care records upon payment of reasonable costs.

(c) Receive a copy of the health care provider's X-ray reports or have the X-rays referred to another health care provider of the patient's choice upon payment of reasonable costs.

(2) The health care provider shall provide each patient with a statement paraphrasing the provisions of this section either upon admission to an inpatient health care facility, as defined in s. 140.85 (1), or upon the first provision of services by the health care provider after April 30, 1980.

(3) The health care provider shall note the time and date of each request by a patient or person authorized by the patient to inspect the patient's health care records, the name of the inspecting person, the time and date of inspection and identify the records released for inspection.